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in the
Supreme Court
of the
United States

OCTOBER TERM, 1985

ALAN C. KAPLUS,

Petitioner,

vs.

GENE E. PHILLIPS, WILLIAM S. FRIEDMAN, SYNTEK OF FLORIDA, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD L. LAPIDUS, ESQUIRE
2222 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
(305) 358-5690

ATTORNEY FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

CAN THE SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY DEPEND UPON THE COMPLEXITY OF THE ISSUE TO BE TRIED?

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OPINIONS OF THE COURTS BELOW

The Opinion, here sought review, of the United States Court of Appeals for the Eleventh Circuit is reported at 764 F.2d 807 (11th Cir. 1985)[1] and set out in the Appendix filed herewith at page 1. The opinion affirms, in part, an unreported decision of the United States District Court for the Southern District of Florida, Miami Division, set out in the Appendix at page 27.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Eleventh Circuit was entered July 2, 1985. Petition for Rehearing was denied September 12, 1985. Jurisdiction is here conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION

The Seventh Amendment to the Constitution of the United States provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law. . ."

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[1]The parties to the proceedings in the Eleventh Circuit included The Johnson Collection, Inc., in addition to the parties named in the petition. Syntek of Florida, Inc.'s affiliated companies are listed in the appendix starting on page 33.

STATEMENT OF THE CASE

Alan C. Kaplus, Gene Phillips, William S. Friedman and Syntek of Florida, Inc. in 1980 formed a partnership to build an office building in Miami, Florida. In 1981, Kaplus purchased his partners' interest through The Johnson Collection, Inc., a New Jersey corporation. In 1982, claiming to have been defrauded, the partners sued Kaplus in the United States District Court for the Southern District of Florida. The sole ground for federal jurisdiction was diversity of citizenship.[2]

The complaint sought, in the alternative, rescission or damages and also sought an accounting. Defendant timely demanded a jury trial.[3] Plaintiffs, to avoid jury trial, dropped their claim for damages, but did not drop their claims for an accounting.

When the lawsuit was filed, the office building that the partnership was to have developed was nearing completion. Kaplus had given Storer Broadcasting Co. an option to purchase the building. Storer would exercise this option before the completion of the trial court

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[2]Although the complaint alleged, and the District Court found, violation of the Securities Act, the Court of Appeals in the decision here sought review, reversed that portion of the judgment. The opinion finds that no sale of security was involved.

[3]The opinion here sought review holds squarely that the demand for jury trial was timely and that Defendant did not waive this right. In the West publication of the case, nine of the ten headnotes are devoted to the right to jury trial issue.

proceedings.[4] Both the trial court and the appellate court recognized that Plaintiffs would be awarded a money judgment at the conclusion of this case.[5]

Over Defendant's objections, the District Court conducted a Bench trial and rendered a thirty page opinion granting an accounting and rescission.[6]

Reading the thirty page opinion of the trial court, no one can say that the result was unjust. But, it is based upon sharply contested findings of fact. No contention is made that Plaintiffs would have been entitled to a directed verdict. An earlier motion for

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[4]In the opinion, here sought review, the Eleventh Circuit states:

> "The trial court restored the plaintiffs' interest in their partnership with Kaplus, not any ownership interest in the building on the land which that partnership had purchased. Indeed, plaintiffs affirmed Storer's purchase of the property and expressly stated they did not wish to interfere with Storer's ownership of that property . . . "

[5]Rescission is a remedy administered by an equity court. But here, in view of the outstanding option, the remedy would restore the plaintiffs to exactly the same award as a jury verdict, money damages. Equity jurisdiction is based upon the inadequacy of a remedy at law. Since in the end, the legal remedy and the equitable remedy are exactly the same, no independent ground existed for the exercise of equity jurisdiction unless the accounting claim warranted it.

[6]It should be noted that the accounting itself has never been tried. What was tried was the right to an accounting, i.e. did the Defendant defraud the Plaintiffs?

summary judgment by the plaintiff was denied. The trial judge chose not to believe the testimony of Kaplus and independent witnesses that the Plaintiffs were fully cognizant of all the facts they claimed ignorance of when they sold their partnership interest. The findings of fact of the trial judge were supported in the record, but those findings were within the province of a jury, the enpaneling of which never took place.

REASON FOR GRANTING THE WRIT

The granting or denying of trial by jury ought not be a matter for the exercise of a trial judge's discretion. To hold that the Seventh Amendment right to trial by jury is dependent, even in part, on the complexity of the issues to be tried, gives to the trial judge the right to determine what is too complex for jury determination.

In *In re Japanese Electronic Products Anti-trust Lit.*, 631 F.2d 1069 (3rd Cir. 1980), the Third Circuit held that where a trial judge determines that issues of fact and law are so complex that to submit them to a jury would deprive a litigant of the Fifth Amendment right to due process of law, the Seventh Amendment must yield to the Fifth. In the case at bar, the Eleventh Circuit held that if an accounting suit is complex,[7] no right to trial by jury exists. No constitutional standard was set. No requirement that a jury could not understand the case. All that was required was a finding that the case is "complex".

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[7]The term used by the Eleventh Circuit was "certainly quite complex".

If deprivation of the right to jury trial depends on the observation of a trial judge that the issues are certainly complex, then the right to trial by jury mandated by the Seventh Amendment to the Constitution becomes not a right but a matter of grace in the Courts of the United States.

The case at bar sought an accounting, a remedy administered historically either by courts of the common law or by courts of equity, depending upon the complexity of the issues to be tried. *Kirby v. Lake Shore & M.S.R. Co.*, 120 U.S. 130, 7 S.Ct. 430, 30 L.Ed. 569 (1887). The judicial determination of how complex was too complex was made historically in a legal system where discovery as we now know it was unknown. Indeed, the need for discovery in a case was, of itself, sufficient grounds for independent equitable jurisdiction. See 27 C.J.S. DISCOVERY, §2 and cases cited therein. The cases from the nineteenth century dividing accounting suits into law or equity rested upon the ability of the then existent legal system to try a complicated numerical case to a jury, some of whose members would probably be illiterate.

In *Dairy Queen v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962), this Court recognized the historic division of accounting suits into law and equity as dependent on complexity:

> "Consequently, in order to maintian such a suit on a cause of action cognizable at law as this one is, the plaintiff must be able to show that the 'accounts between the parties' are of such a 'complicated nature' that only a court of equity can satisfactorily unravel them . . . "

But, recognizing that the changed legal system itself might render obsolete this test for depriving the litigant of the right to trial by jury, the Court also held:

> "In view of the powers given to the District Courts by Federal Rules of Civil Procedure 53 (b) to appoint masters to assist the jury in those exceptional cases where the legal issues are too complicated for the jury to adequately handle alone the burden of such a showing is considerably increased and it will indeed be a rare case in which it can be met . . . "

In two footnotes, this Court cautioned that the complexity inroad to the right to trial by jury should seldom be made (footnote 18) and that procedural changes seemingly have removed the basis of much equity jurisdiction, the inadequacy of a remedy at law (footnote 19).

Dairy Queen was followed by *Ross v. Bernard*, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970). In that case, this Court grounded the right to jury trial on modern procedural remedies rather than historical precedent set when chancellors sat on the wool-sack. In footnote 10, however, it seemingly recognized again the complexity exception:

> "As our cases indicate the 'legal' nature of an issue is determined by considering first, the pre-merger custom with reference to such questions; second, the remedy sought; and *third, the practical abilities and limitations of juries.* Of these factors, the first, requiring extensive and possibly abstruse historical inquiry is obviously the most difficult to apply . . . " (emphasis added)

The Third Circuit refused to recognize that footnote as the definitive view of this Court on the question of the complexity exception in *In re Japanese Electronic Products Anti-trust Lit., (supra)*:

> "The District Court made no use of the *Ross* footnote finding it too brief to authorize a major departure from the traditional construction of the Seventh Amendment. 478 F.Supp. at page 926-30. We also find it unlikely that the Supreme Court would have announced an important new application of the Seventh Amendment in so cursory a fashion. Yet, at the very least, the Court has left open the possibility that the 'practical abilities and limitation of juries' may limit the range of suits subject to the Seventh Amendment and has read its prior Seventh Amendment decisions as not precluding such a ruling . . . "
> (p. 1080)

The Third Circuit then went on to hold that where the issues are so complex that a jury is unable to understand them, the Fifth Amendment to the Constitution, the right to due process of law, requires a Bench trial:

> "Therefore we find the most reasonable accomodation between the requirements of the Fifth and Seventh Amendments to be a denial of jury trial when a jury will not be able to perform its task of rational decision making with a reasonable understanding of the evidence and the relevant legal standards. In lawsuits of this complexity, the interest protected by this procedural rule of due process carry greater

> weight than the interest served by the constitutional guaranty of jury trial. Consequently, we do not read the Seventh Amendment to guaranty the right to trial by jury in those suits . . . "
> (p. 1086)

In the case at bar, the Eleventh Circuit refused to follow the Third Circuit:

> "While at least one circuit has suggested that mere complexity of facts alone can provide the basis for equitable jurisdiction and the denial of a jury trial, In re Japanese Electronic Products Anti-trust Litigation, 631 F.2d 1069 (3d Cir. 1980), we have not done so, and we do not do so here . . . "
> (p. 4882)

However, it then carried the complexity exception to the Seventh Amendment right beyond the narrow constitutional ground of the Third Circuit. It adopted the *Ross* footnote as the test to determine the right to trial by jury:

> "In light of the problems experienced by federal courts in attempting to classify various claims, the Supreme Court in Ross v. Bernard, 396 U.S. 531, 90 S. Ct. 733, 24 L.Ed.2d 729 (1970) recognized three factors that may be considered when examining whether a particular claim gives right to a jury trial; (1) the customary manner of trying such a case before the merger of law and equity in 1938; (2) the kind of remedy

sought by the plaintiff; and (3) the abilities and limitations of a jury in deciding the issue . . . "

The Court did not apply the Fifth Amendment test set out by the Third Circuit were the issues so complex that to try them to a jury would deprive a litigant of due process of law? Drawing on the historical view of accounting suits, it held:

> "Yet in the specific case of actions for accounting, the courts have recognized that complexity of the accounts is one of the reasons for drawing the accounting action into equitable jurisdiction . . . In any event, to the extent that Ross suggests that such a factor is relevant, we observe that the claims and remedies involved in the instant action are *certainly quite complicated and in this regard our decision is consistent with that aspect of the Ross decision* . . . "
> (emphasis added) (p. 4882)

The decision of the Third Circuit in *In re Japanese Electronic Products Anti-trust Lit., (supra)*, and the decision of the Eleventh Circuit in the case at bar, though both condone the deprivation of a jury trial, conflict sharply as to the reasons and as to the breath and scope of the exception. *In re Japanese Electronic Products Anti-trust Lit., (supra)*, was an anti-trust case, but, based in part its' reasoning on the permissible complexity exception found in accounting suits. *Dairy Queen, (supra)*, and the case at bar were accounting suits, amphibians of the courtroom heard either at law or at equity. History points neither in one direction nor the other, the remedy sought was available from chancellor or judge and jury.

If the right to trial by jury in a complex case is defined, it ought be in a suit for an accounting. There, originally, the limitations of a jury were recognized and equity afforded relief because the remedy at law was inadequate. Whether that historical impediment still exists in our modern legal system, set in an increasingly complex society ought be decided definitively by this Court.

Can the right to trial by jury depend on the complexity of the issue to be tried? If it can, is the measure used to judge complexity the Fifth Amendment due process clause, whether the matter is so far beyond the comprehension of a jury that to try it to a jury deprives a litigant of due process of law? May the right to trial by jury be ignored simply because a trial judge views the matter as complex and one which is easier handled by a Bench trial?

Decisions of the Eleventh and Third Circuit conflict. Both depart from the accepted and usual course of judicial proceedings. A definitive ruling on the way cases are tried in the Courts of the United States is needed.

Respectively submitted,

RICHARD L. LAPIDUS
Attorney for Petitioner

Appendix

Gene E. PHILLIPS, et al.,
Plaintiffs-Appellees,

v.

Alan C. KAPLUS and the Johnson Collection, Inc.,
Defendants-Appellants.

No. 84-5316.

United States Court of Appeals,
Eleventh Circuit.

July 2, 1985.

Plaintiff joint venture partners sued defendant fellow venturers and others seeking rescission of sale of plaintiffs' interest to a corporation controlled by defendant venturer, dissolution of venture and an accounting. The United States District Court for the Southern District of Florida, Sidney M. Aronovitz, J., rendered judgment for plaintiffs and awarded them attorney fees under Florida Securities Act, and defendants appealed. The Court of Appeals, Brown, Circuit Judge, sitting by designation, held that: (1) rescissionary relief was available and was properly tried without a jury, notwithstanding that a previous tenant had exercised its option to buy the subject property; (2) request for accounting was not tantamount to a legal claim for damages and was triable by the court; and (3) fact that lawyer who arranged purchase of plaintiffs' interest therein did not give rise to an investment contract within meaning of state Securities Act.

Affirmed in part, reversed in part, and remanded.

1. Jury —25(8)

Defendants' demand for jury trial, albeit following the counterclaim, gave plaintiffs notice that defendants sought trial by jury on all issues so triable presented in the pleadings and defendants did not waive their right to a jury trial on issues set out in the complaint. Fed.Rules Civ.Proc.Rule 38(c), 28 U.S.C.A.

2. Jury —10

Seventh Amendment [U.S.C.A. Const. Amend. 7] preserves right to trial by jury in suits in which the legal rights are to be determined, in contrast to those in which equitable rights and remedies are involved.

3. Jury —13(1)

Jury trial predicated on a legal cause of action is not to be defeated or impaired by a prior proceeding without a jury on other issues involved in the same case. U.S.C.A. Const.Amend. 7.

4. Federal Courts —433

Right to a jury trial in federal court is to be determined as a matter of federal law. U.S.C.A. Const.Amend. 7.

5. Jury —14(6)

Under federal law, an action for rescission is equitable, triable by the court without a jury, but if the right to rescission itself is unavailable under state law, it must be so also in a diversity case. U.S.C.A. Const.Amend. 7.

6. Jury —14(6)

Rescissionary relief was available to plaintiff joint venture partners, seeking to restore the parties to their positions as joint venturers as they existed before alleged fraudulent transfer of partnership property to defendant occurred, and the matter was properly tried by the court without a jury, notwithstanding that a tenant had exercised its option to buy the property; plaintiff venturers did not seek return of an ownership in the building on land which the partnership had purchased but merely sought restoration to their positions as joint venturers and an accounting. U.S.C.A. Const.Amend. 7.

7. Jury —10

For those claims which traditionally were cognizable at law, the right to a jury is generally preserved by the Seventh Amendment [U.S.C.A. Const.Amend. 7]; for those claims which historically were considered equitable, no jury trial is mandated.

8. Jury —9

Factors considered when examining whether a particular claim gives rise to a jury trial under Seventh Amendment [U.S.C.A. Const.Amend. 7] are: the customary manner of trying such a cause before the merger of law and equity in federal courts in 1983; the kind of remedy sought by plaintiff; and abilities and limitations of a jury in deciding the issue.

9. Jury —14(3)

Defendant joint venture partners were not entitled to jury trial of accounting aspect of plaintiff venturers request for dissolution of the venture after restoration of their interest therein, with accounting as a part of dissolution, in that request for accounting was not tantamount to legal claim for damages but involved a settlement of partnership accounts; fact that ultimate disposition involved a distribution of partnership assets did not convert the action into a legal action for damages. U.S.C.A.Const.Amend. 7.

10. Securities Regulation —309

Attorney's obtaining a five percent interest in corporation which purchased plaintiff venturers' interest in joint venture property had not obtained an "investment contract" or security, within meaning of Florida Securities Act [West's F.S.A. §517.-211(6)], so as to authorize award of attorney fees under the Act to plaintiffs when the transaction was rescinded; counsel's presence in enterprise was not result of his investment of money or services with hope of making profit but was compensation for services rendered defendant venturer in improperly obtaining plaintiffs' interest.

See publication Words and Phrases for other judicial constructions and definitions.

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY, and TJOFLAT, Circuit Judges, and BROWN*, Senior Circuit Judge.

JOHN R. BROWN, Circuit Judge:

The case before us involves a dispute between joint venture partners: Alan C. Kaplus, defendant-appellant, and Gene E. Phillips, et al., plaintiffs-appellees. The suit arose as a result of alleged fraud and misrepresentations on the part of Kaplus in connection with his purchase from plaintiffs of their interest in a joint venture partnership for development of real estate. The court below determined that Kaplus had defrauded his partners in purchasing their interest. The court also awarded plaintiffs attorneys fees under the Florida Securities Act. The questions presented for our review are whether the district court correctly tried the case without a jury, and whether the district court correctly held that defendants' failure to disclose material facts to plaintiffs in connection with the transaction in issue constituted fraud in connection with the purchase or sale of a security under federal or Florida state securities law.

For the reasons stated below, we affirm the district court's denial of a jury trial. However, we believe that the transactions in question did not involve a security; therefore, we reverse that portion of the district court's decision awarding plaintiffs' attorneys' fees under the Florida state securities laws, F.S. §517.211(6).

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*Honorable John R. Brown, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

I. *Facts*

The individual plaintiffs in this diversity action, Gene E. Phillips and William S. Friedman,[1] formed a corporation called Syntek of Florida, Inc. (Syntek). In 1980, the individual plaintiffs, Syntek, and defendant, Alan C. Kaplus (Kaplus)[2] entered into a joint venture partnership—Biscayne Centre Associates (Biscayne). Biscayne acquired title to two blocks of land on Biscayne Boulevard in Miami, Florida, with plans to construct one or more office buildings on the property. Syntek was designated as the managing partner, but Kaplus was in charge of overseeing the project, as well as identifying prospective tenants for the buildings.

After some investigation, Kaplus reported to his partners that the leasing prospects for the proposed building were dim, although Kaplus did mention the remote possibility of a lease with Storer Broadcasting Corp. (now Storer Communications). Plaintiffs contend, and the trial court found, that Kaplus painted a pessimistic picture regarding the prospect of a lease with Storer when, in fact, Kaplus and Storer were engaged in serious negotiations for the terms of a lease agreement, including an option to purchase on the part of Storer. Kaplus advised that, in light of the poor prospects for the planned office complex, he had located a New Jersey investor (The Johnson Collection, Inc.) which was interested in purchasing the entire project. Plaintiffs

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[1]The plaintiff group also involved several corporations which had been formed by Phillips and Kaplus.

[2]The other named defendant is a New Jersey corporation, The Johnson Collection, Inc.

agreed to sell their interest to the New Jersey investors, ignorant of the fact that the Storer lease had virtually been finalized. Kaplus later told Phillips that the prospective purchaser (The Johnson Collection) wanted Kaplus to retain a "minority interest" in Biscayne so that he could manage the property.

The Johnson Collection, the purchaser of plaintiffs' interest, was a corporation which had been formed by a New Jersey lawyer named Larry Cole. Unknown to plaintiffs, Cole was a friend of defendant Kaplus, and had in fact agreed to use the Johnson Collection to purchase plaintiffs' interest in Biscayne, and then to transfer that interest to Kaplus.[3] In this way, Kaplus hoped to obtain full ownership of the Biscayne enterprise, without letting his partners know that he was buying them out. In early 1981, the deal was completed, and plaintiffs sold their interest in Biscayne to the Johnson Collection.

In late November of 1981, plaintiffs first became aware of the facts which had been withheld by the defendants regarding the Storer transaction and Kaplus' interest in the Johnson Collection. Plaintiffs instituted this action, which was tried before the court without a jury. The Trial court held that Kaplus failed to make a full disclosure to plaintiffs of the extent of his interest in the ostensible purchaser, the Johnson Collection, thereby committing a breach of fidelity due to plaintiffs

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[3]Agreements between Kaplus and Cole provided that, once the Johnson Collection had purchased plaintiffs' interest, Cole was to transfer that interest to Kaplus. However, Cole was to retain a 5% interest in the Biscayne project, leaving Kaplus with a 95% interest therein.

as his joint venturers. The trial court further held that Kaplus' actions constituted common law fruad, entitling plaintiffs to an order rescinding the sale of their interest in Biscayne Center Associates, and restoring their ownership interest in the joint venture partnership as they existed prior to their sale of their interests of Kaplus. The trial court further stated that upon rescission, plaintiffs are entitled to an order declaring that the joint venture be dissolved, that an accounting be conducted by the parties incidental thereto under the supervision of the Court, and that a lien be impressed upon Kaplus' interest in the joint venture or the proceeds thereof, for all of his obligations found due in the accounting.

II. *Right to a Jury Trial*

We first consider the lower court's decision to conduct a bench trial on plaintiffs' claims. Defendants maintain that the pleadings below raised legal issues, and that the Court's trial of plaintiffs' claims denied defendants' their Seventh Amendment right to a trial by a jury. We thus examine the pleadings below, and the nature of the issues presented therein.

Counts I and II of plaintiffs' original complaint sought rescission of their sale-purchase transaction with the defendants due to violation of federal and Florida securities laws. Both counts initially asked for damages in the alternative; however, plaintiffs subsequently withdrew all claims for damages.

The prayer in Count III, based on diversity jurisdiction, originally sought injunctive relief, the declaration of a trust, and the imposition of a lien upon

defendants' interest in the venture. It was amended before an answer was filed to include a request for the remedy of common law rescission. Count IV, also based on diversity jurisdiction, sought dissolution of the partnership, an accounting incidental thereto, and the imposition of a lien. Plaintiffs later added a fifth count to the complaint seeking rescission under New York's securities law.

Defendants timely filed an Answer, containing affirmative defenses and counter claims. The first two counts of defendants' counterclaim sounded in tort, seeking damages for slander and interference with Kaplus' business. The third count of the counterclaim sought damages in connection with another venture in which plaintiffs and defendants were mutually involved. The final paragraph of the counterclaim contained defendants' request for a jury trial, and read as follows:

> WHEREFORE, being injured, Counter Plaintiff, Alan Kaplus, demands compensation and punitive damages of the plaintiffs and Syntek Corporation and requests trial by jury of all issues so triable.

Kaplus later filed an Amended Counterclaim and then a Second Amended Counterclaim, dropping the third count of the original counterclaim, and adding a claim for rescission of the parties' original joint venture partnership agreement. Plaintiffs, having dropped their claims for damages, asserted that the only legal issues remaining in the case were defendants' counterclaims sounding in tort. Since these counterclaims were not directly related to the claims in plaintiffs' complaint, and since trial of the issues presented in plaintiffs'

complaint would not affect the disposition of the tort claims, plaintiffs asked the Court to separate the issues, trying the equitable issues presented in their complaint first without a jury, then the legal issues raised in the counterclaim before a jury. The district court granted plaintiffs' requests and informed the parties of its intention to try first the plaintiffs' claims without a jury. Subsequently, Kaplus himself dismissed the second amended counterclaim.[4] Defendants still maintain, however, that plaintiffs' claims raised legal issues entitling them to a trial by a jury in accordance with their request.

A. *Waiver*

[1] Plaintiffs, attempting to head defendants off at the pass, first assert that, regardless of the presence of any legal issue in the complaint, defendants failed properly to request a jury trial for those issues, as required by F.R.Civ.P. 38.[5] Plaintiffs contend that, by attaching their jury demand to the counterclaim, defendants waived their right to a jury trial on issues set out in the complaint.

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[4]Thus, if the trial court's decision to try plaintiffs' claims without a jury before trying defendants' legal counterclaims constituted error, it was harmless.

[5]F.R.Civ.P. 38:

(b) **Demand.** Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

On our reading of the pleadings, plaintiffs' assertion of waiver is incorrect. Kaplus' demand for a jury trial was not confined to the counterclaim; it specifically requested "trial by jury of all issues so triable." If a defendant's demand for a jury trial does not specify particular issues which the defendant wishes to be tried by a jury, such a request has the effect of demanding a jury trial of "all issues so triable." F.R.Civ.P. 38(c). Kaplus' demand for a jury trial, albeit following the counterclaim, timely satisfied Rule 38(b) demand requirements, and gave plaintiffs notice that defendant sought trial by jury on all issues so triable presented in the pleadings.

B. *Nature of the Issues*

[2,3] We turn now to defendants' contention that they were entitled to a jury trial on the issues presented in this case. The Seventh Amendment preserves the right to trial by jury in suits in which legal rights are to be determined in contrast to those in which equitable rights and remedies are involved. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433,446-47, 7.L.Ed. 732 (1830). The seminal case of *Beacon Theatres v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959), and its progeny recognized that a jury trial predicated on a legal cause of action is not to be defeated or impaired by a prior proceeding without a jury on other issues involved in the same case. *See also Eli Lilly Co. v. Generix Drug Sales, Inc.*, 460 F.2d 1096, 1107 (5th Cir.1972); *Swofford v. B & W, Inc.*, 336 F.2d 406 (5th Cir.1964), *cert. denied*, 379 U.S. 962, 85 S.Ct. 653, 13 L.Ed.2d 557 (1965); *Thermo-Stitch, Inc. vs Chemi-Cord Processing Corp.*, 294 F.2d 486 (5th Cir.1961). In the present action, the defendants maintain that the remedies sought by plaintiffs, and granted by

the district court—namely, rescission of plaintiffs' sale of their partnership interests, the placing of a constructive trust on all assets of the Biscayne office complex venture, and a subsequent dissolution of the partnership and an accounting incidental thereto—are legal in nature, thus entitling them to a jury trial on these issues.

1. *Rescission*

[4,6] The essence of plaintiffs' complaint below was a request to rescind the transfer of their partnership interest to Kaplus, and to restore the parties to their positions as joint venturers as they existed before the fraudulent transfer took place. Defendants argue that this equitable relief is unavailable in the present case, and that therefore plaintiffs must instead pursue a legal claim for money damages, giving defendants the right to a jury trial. Defendants cite Florida law for the proposition that rescission is unavailable unless it is possible to restore the parties to the status quo existent at the time of the transfer which is sought to be rescinded. *Gentry v. Smith*, 487 F.2d 571, 578 (5th Cir.1973); *Zapetis v. Wills*, 156 So.2d 33 (Fla. 3d Dist.Ct.App.1963). Defendants then argue that, since the previous tenant, Storer Communications, has exercised the option to buy the Biscayne property given to it by Kaplus, it is impossible to return the parties to the status quo at the time of plaintifs' sale of their partnership interest in Biscayne.

At the outset, we point out that the right to a jury trial in the federal court is to be determined as a matter of federal law. *Simler v. Conner*, 372 U.S. 221, 222, 83 S.Ct. 609, 610, 9 L.Ed.2d 691 (1963); *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 538, 78 S.Ct. 893, 901, 2 L.Ed.2d 953 (1958); *Nunex v.*

Superior Oil Co., 572 F.2d 1119, 1125 (5th Cir.1978). And the federal law is clear that an action for rescission is equitable, triable by the court without a jury. *Arber v. Essex Wire Corp.*, 490 F.2d 414, 422 (6th Cir.1974), *cert. denied*, 419 U.S. 830, 95 S.Ct. 53, 42 L.Ed.2d 56 (1974); *Mallory v. Citizens Utilities Co.*, 342 F.2d 796, 797 (2d Cir. 1965); *Liberty Mutual Ins. Co. v. Gerald*, 170 F.2d 917, 919 (5th Cir.1948); *see generally* 5 Moore's Federal Practice ¶38.23 at 38-187, n. 1 (2d ed. 1984) (listing cases). Nevertheless, if the right to rescission itself is unavailable under state law, it must be so also in this diversity case, since "Congress never gave nor did the federal courts ever claim, the power to deny substantive rights created by state law or to create substantive rights denied by state law." *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945).

We disagree, however, with defendants' analysis under Florida law. Defendants misapprehend the nature of plaintiffs' claim. Restoring the plaintiffs to their status quo in this case means returning them to their interest in the Biscayne Center joint venture. The trial court restored the plaintiffs' interest in their partnership with Kaplus, not any ownership interest in the building on the land which that partnership had purchased. Indeed, plaintiffs affirmed Storer's purchase of the property, and expressly stated that they did not wish to interfere with Storer's ownership of that property. Instead, what they sought, and what they received, was restoration to their position as joint venturers in the Biscayne Center Associates enterprise. In this case, the accounting ordered incident to the rescission will insure a proper return to the status quo before the transaction, and will serve to balance the equities between the parties.

O'Donnell v. Novak, 183 So.2d 884 (Fla. 3d Dist. Ct.App.1966). We conclude, therefore that rescissionary relief was properly available to plaintiffs, and was properly tried by the court below without a jury.

2. *Accounting*

[7-9] In count IV of their complaint, the plaintiffs asked the court to dissolve the partnership after restoration of their interest therein, and to render an accounting as part of the dissolution. Defendants contend that irrespective of any other relief sought, they were entitled to a jury trial on the accounting issue, maintaining that in the present case, plaintiffs' request for an accounting is tantamount to a legal claim for damages.

The basic consideration for determining when the right to a jury trial exists is the historical distinction between law and equity. For those claims which traditionally were cognizable at law, the right to a jury is generally preserved; for those claims which historically were considered equitable, no jury trial is mandated. *In Re Graham*, 747 F.2d 1383 (11th Cir.1984).

As a result of the merger of law and equity in the federal courts, however, and the evolution of both legal and equitable issues, courts have at times struggled with the legal or equitable classification of particular types of claims. In light of the problems experienced by federal courts in attempting to classify various claims, the Supreme Court, in *Ross v. Bernhard*, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970), recognized three factors that may be considered when examining whether a particular claim gives rise to a jury trial: (1) the

customary manner of trying such a cause before the merger of law and equity in 1938; (2) the kind of remedy sought by the plaintiff, and (3) the abilities and limitations of a jury in deciding the issue. *Ross*, 396 U.S. at 538 n. 10, 90 S.Ct. at 738 n. 10; *see also Cox v. C.H. Masland & Sons, Inc.*, 607 F.2d 138, 143 (5th Cir.1979).

Using this analysis, we conclude that the district court was clearly correct in determining that no right to a jury trial existed here. First, and most important, an accounting between partners has traditionally been considered an equitable form of action. While the accounting action grew out of the old common law action of account render, *Williams v. Collier*, 32 F.Supp. 321, 324 (E.D.Pa.1940), an action for an accounting between partners has generally been considered equitable. 5 Moore's Federal Practice, ¶38.25 at 38-208 (2d Ed. 1984). Indeed, it has been said that a court of equity is the only forum in which partnership affairs can be settled. 60 Am. Jur.2d Partnership §266 (1972).

Moreover, under federal law, actions for accounting have traditionally been considered equitable. *See, e.g., Kirby v. Lake Shore & Michigan Southern Railroad Co.*, 120 U.S. 130, 7 S.Ct. 430, 30 L.Ed. 569 (1887); *Friedman v. Golden Arrow Films, Inc.*, 442 F.2d 1099 (2d Cir.1971); *Luff v. Luff*, 158 F.Supp. 311 (D.C.D.C.1958), *rev'd in part*, 267 F.2d 643 (D.C.Cir.1959); *Edward B. Marks Music v. Wonnell*, 4 F.R.D. 146 (S.D.N.Y.1944); *Taylor v. McKeever*, 1 F.R.D. 565 (E.D.N.Y.1940). Additionally, while not controlling here, we observe that Florida courts also recognize the equitable nature of an accounting. *See, e.g., Padgett v. First Federal Savings and Loan Association*, 378 So.2d 58 (Fla. 1st

Dist.Ct.App. 1979); *Riggs v. Saltmarsh, Cleaveland and Gund*, 341 So.2d 818 (Fla. 1st Dist.Ct. App.1977).

With regard to the second *Ross* factor, the remedy sought, we believe a similar conclusion is warranted. In the present action, plaintiffs have requested a rescission and restoration of their partnership interest so that the partnership may be formally, properly and equitably dissolved and so that a winding up or accounting may restore to both parties all equitable sums due. Thus, this action involves the settlement of partnership accounts—the type of action clearly committed to the equitable jurisdiction of the court.

Defendants' reliance on *Dairy Queen v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962) is misplaced. *Dairy Queen* held that a request for a nominally equitable remedy could not be used to convert what was otherwise a legal claim into an equitable one in order to defeat the right to a jury trial. In that case, the court examined the plaintiff's request for an accounting, determined that it was really a legal claim for breach of contract, and properly rejected plaintiff's equitable characterization of the claim.

As discussed, the type of relief requested by plaintiff here necessarily involves the court's equitable jurisdiction. The fact that the ultimate disposition of the action will involve a distribution of partnership assets to all parties does not convert this into a legal action for damages. Rather, it merely is the natural consequence of the winding up of partnership affairs. This is simply not a case where the party is attempting to disguise a legal claim for damages by asking for an accounting.

As to the third factor recognized in *Ross*—the abilities and limitations of the jury—we acknowledge the timidity with which the courts have addressed this issue. While at least one circuit has suggested that mere complexity of facts alone can provide the basis for equitable jurisdiction and the denial of a jury trial, *In Re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069 (3d Cir.1980), we have not done so, and we do not do so here. Yet in the specific case of actions for accounting, the courts have recognized that complexity of the accounts is one of the reasons for drawing the accounting action into equitable jurisdiction. *Kirby v. Lake Shore & Michigan Southern P.R.*, 120 U.S. 130, 134, 7 S.Ct. 430, 432, 30 L.Ed. 569 (1887); *see generally* Note, Unfit for Jury Determination: Complex Civil Litigation and the Seventh Amendment Right of Trial by Jury, 20 B.C.L.Rev. 511, 525-26 (1979). In any event to the extent that *Ross* suggests such a factor is relevant[6], we observe that the claims and remedies involved in the instant action are certainly quite complicated, and in this regard our decision is consistent with the aspect to the *Ross* decision.

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[6]Whether or not this factor retains any vitality is indeed open to question. As the court observed in *In Re Financial Securities Litigation*, 609 F.2d 411 (9th Cir.1979), *cert. denied sub nom, Gant v. Union Bank*, 446 U.S. 929, 100 S.Ct. 1866, 64 L.Ed.2d 281 (1980) on several occasions since *Ross*, the Supreme Court has considered the Seventh Amendment question without once considering the practical abilities and limitations of juries. *Id.* at 426, n. 48, *citing Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979); *Atlas Roofing Co. v. Occup. Safety Comm'n*, 430 U.S. 442, 97 S.Ct. 1261, 51 L.E.D.2d 464 (1977); *Pernell v. Southall Realty*, 416 U.S. 363, 94 S.Ct. 1723, 40 L.Ed.2d 198 (1974); *Curtis v. Loether*, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974); *Colgrove v. Battin*, 413 U.S. 149, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1973).

In conclusion, we are convinced that the trial court correctly determined that the issues presented below were equitable, and that therefore no jury trial was mandated. Plaintiffs' request for rescission of the sale of their partnership interest, a reformation of that partnership, and a subsequent winding up and accounting of partnership affairs all presented traditional equitable proceedings, and the district court was correct in denying a jury trial on these issues.

III. *Application of Securities Laws*

We turn next to the trial court's award of attorneys' fees under the Florida Securities Act, F.S. §517.211(6).[7] Plaintiffs alleged, and the trial court found, that Larry Cole, the New Jersey attorney who arranged the purchase of plaintiffs' interest, and took a 5% interest therein, was a passive investor in the partnership interest sold by plaintiffs. The Court then reasoned that, under the line of cases beginning with *Securities and Exchange Commission v. Howey*, 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946), Cole's purchase constituted an investment contract, and was thus a security under federal and state securities laws. On this basis, the Court determined that attorneys' fees were appropriate under the Florida statute.

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[7] F.S. 517.211(6):

In any action brought under this section, including an appeal, the court shall award reasonable attorneys' fees to the prevailing party unless the court finds that the award of such fees would be unjust.

Under the Securities Act of 1933,[8] a "security" is defined as follows:

> When used in this subchapter, unless the context otherwise requires—
>
> (1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

15 U.S.C.A. §77b(1) (West 1981).

[10] Plaintiffs contend that Cole's interest constituted an "investment contract" and was therefore a "security" as defined in the Act. Our analysis must therefore begin with the seminal case of *Securities and Exchange Commission v. Howey*. In *Howey*, the Supreme Court analyzed a scheme whereby potential investors

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[8]Since the definition of "security" under the Florida statute is the same as that under federal law, *Wiener v. Brown*, 356 So.2d 1302 (Fla. 3d Dist.Ct.App.1978), we look to federal law in reviewing the district court's decision.

were offered the purchase of individual rows of trees in a citrus grove development, in conjunction with a contract for the cultivation and marketing of the trees by the seller of these interests. In return, the purchasers were to receive the net profits from the harvest and marketing of the citrus fruit from the trees. The Court held that this plan constituted an investment contract under the Act of 1933. The Court observed that the purchasers of the trees were primarily business people who lacked the skill and knowledge necessary for the care and cultivation of citrus trees. Rather, the Court determined that the trees were purchased with the hope and expectation that the sellers would successfully manage the enterprise, market the fruit, and return substantial profits to the purchasers. In holding that this was the type of transaction the Securities Act was meant to encompass, the Court defined an investment contract to be a "contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party. . . ." 328 U.S. at 298-99, 66 S.Ct. at 1102-03.

Howey recognized that the Securities Acts, which were passed to correct serious abuses in the then largely unregulated securities markets, were intended to reach the "countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *Id.* at 299, 66 S.Ct. at 1103. Since *Howey*, the Supreme Court, this Court and other federal courts have reiterated that Congress intended the application of the statutes to turn not on the name by which a particular transaction is designated, but rather on the economic realities of the commercial enterprise in question. *United Housing Foundation v. Forman*, 421

U.S. 837, 95 S.Ct. 2051, 44 L.Ed.2d 621 (1975); *King v. Winkler*, 673 F.2d 342 (11th Cir. 1982); *SEC v. Professional Associates*, 731 F.2d 349 (6th Cir.1984); *United American Bank of Nashville v. Gunter*, 620 F.2d 1108 (5th Cir.1980).

In the instant case, the district court found that defendant Kaplus utilized Larry Cole and the Johnson Collection, Inc. as a means of purchasing plaintiffs' interest in the Biscayne Center Joint Venture. As part of the scheme, Cole and Kaplus agreed that once the Johnson Collection had acquired plaintiffs' interest, the Johnson Collection would transfer 95% of that interest to Kaplus. The corporation, however, was to retain 5% of the interest so acquired.

The district court then looked through the corporate form used in the transaction and determined that plaintiffs' interest in Biscayne had been purchased not by the Johnson Collection, Inc., but rather by two individuals—Cole and Kaplus. Further analyzing the relationship between these two, the Court observed that agreements between Cole and Kaplus anticipated that Kaplus would be in charge of all aspects of the management of the Florida property. Cole, as the owner of a mere 5% of the enterprise, was to have nothing to do with the day-to-day operation of the partnership. The Court concluded that Cole was a passive investor in the venture, that he intended to rely solely on the efforts of Kaplus for profits therefrom, and that Cole's interest thus constituted a security.

We observe initially that the district court's characterization of Cole's interest in the enterprise is not directly at odds with the *Howey* analysis. As discussed, the *Howey* test for an investment contract requires an

investment in a common enterprise with the expectation of profits to be derived solely from the efforts of others.[9] Assuming for the moment that the requirements of a common enterprise and dependence on the managerial efforts of others are met, we nevertheless decline to find that a security existed here. This holding is based on our belief that, whatever the relationship between Cole and Kaplus, Cole's interest simply was not an "investment" as contemplated by the Securities Act.

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[9]The requirement that profits be derived "solely" from the efforts of others has proved to be a controversial aspect of the *Howey* test. In *Securities and Exchange Commission v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476 (9th Cir. 1973), *cert. denied*, 414 U.S. 821, 94 S.Ct. 117, 38 L.Ed.2d 53 (1973), the Ninth Circuit adopted a somewhat broader test, asking simply whether the "essential managing efforts which effect the failure or success of the enterprise" are those of a third party. In *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 95 S.Ct. 2051, 44 L.Ed.2d 621 (1975), the Supreme Court acknowledged the Ninth Circuit's test, but expressed no view as to its propriety, instead simply restating the *Howey* test. 421 U.S. at 852 n. 16, 95 S.Ct. at 2060 n. 16.

While the former Fifth Circuit appeared to adopt the *Turner* test in *Securities and Exchange Comm. v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 479-84 (5th Cir.1974), that court subsequently observed that the Supreme Court had "reaffirmed the test first enunciated in *Howey* . . . " *Piambino v. Bailey*, 610 F.2d 1306, 1317 (5th Cir.1980), *cert. denied*, 449 U.S. 1011, 101 S.Ct. 568, 66 L.Ed.2d 469 (1980). This Court has yet to decide whether *Koscot* and the line of cases following it conflict with *Howey* and *Forman*. *Villeneuve v. Advanced Business Concepts*, 730 F.2d 1403, 1404 n. 2 (11th Cir.1984) (en banc). *But see Villeneuve v. Advanced Business Concepts*, 698 F.2d 1121, 1125-27 (11th Cir. 1983) (Kravitch, J., dissenting, arguing that *Koscot* requires application of the broader *Turner* test). While we acknowledge the conflict, our disposition of the case makes unnecessary any resolution of this issue.

The record below contains no evidence that Cole's presence in the enterprise was the result of his investment of money or services with the hope of making a profit. To the contrary, the testimony of both Kaplus and Cole, elicited by adverse counsel, suggests that Cole received his 5% interest as compensation for services rendered in purchasing plaintiffs' interest. On direct examination, Kaplus discussed Cole's status in the transaction:

Q Mr. Cole was to get some interest in the deal. Is that right?

A Yes.

* * * * * *

Q So Mr. Cole was to get a percentage of what the Johnson Collection would have. Is that correct? The original deal.

A Yes.

Q And that was for getting Mr. Horowitz [a potential investor in the enterprise] and his associates into the deal. Is that correct?

A That is what I understood the arrangements to be.

Q After Mr. Horowitz and his associates dropped out, did Mr. Cole remain in the deal?

A Yes.

Q Why?

A Well, Larry [Cole] was a very good friend of mine and we had a situation some years ago, 1974, where an associate of [plaintiff] Mr. Phillips, but unrelated to Mr. Phillips, needed some financing for construction and Larry's father had recently passed away, and he had some money that he needed to reinvest in a like deal. To make a long story short, . . . Larry's estate, father's estate, lost, I think it was about 120 thousand or something along those lines. I always said to Larry, if I ever had an opportunity to make this up to you, even though it was not my fault or Mr. Phillips' fault, I would do so. He had worked on this deal and I thought it fair to include him in this transaction in a small percentage. That is exactly the way it came down.

Q I see. You did it for past favors and also for what he had done in this deal for you?

A That's correct.

Trial Record at 106-08.

Similarly, Larry Cole's testimony reflects that his interest was not an investment, but rather compensation for his part in the transaction:

Q You were going to be a co-investor?

A I was going to receive some stock.

Q From whom were you going to get that stock?

A The transaction itself. I was taking a percentage of the deal.

Q Without putting any cash in?

A Without putting any cash?

Q It was for services.

A It was for bringing the people together, yes sir. And in part for the work I was doing.

Trial Record at 529-30.

While we hesitate to place undue reliance on the potentially self-serving testimony of Kaplus and his colleague Cole, we are convinced that this examination by adverse counsel accurately reflects the nature of Cole's interest in the venture. Moreover, the record is devoid of compelling contrary evidence that Cole's status was truly that of an investor. We are thus unpersuaded that any "investment" took place here. The Securities Acts were passed to curb abuses in a particular type of transaction: "the sale of securities to raise capital for profit-making purposes. . . . " *Forman*, 421 U.S. at 849, 95 S.Ct. at 2059. Such a transaction is simply not involved here. While we recognize that, as remedial statutes, the securities acts are to be broadly construed, *Tcherepnin v. Knight*, 389 U.S. 332, 336, 88 S.Ct. 548, 19 L.Ed.2d 564 (1967), they must also be construed against the background of their purpose. As broad as the definition of security may be, it was not intended to encompass a transaction such as the one in issue here.

CONCLUSION

In summary, we affirm the district court's determination that no right to a jury trial existed on the issues presented in this case. We disagree, however, with the district court's conclusion that Cole's interest in the venture constituted a security, and thus the award of attorneys' fees under F.S. 517.211(6) is reversed. As the district court's opinion reveals that an accounting and winding up of the partnership affairs has yet to take place, we remand the case for proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

[FILED APR 10]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 82-0228-Civ-SMA

GENE E. PHILLIPS, et al.,

Plaintiffs,

vs.

ALAN C. KAPLUS, and
THE JOHNSON COLLECTION, INC.,

Defendants.

PARTIAL FINAL JUDGMENT

THIS ACTION came on for trial before the Court without a jury. The Court has rendered and entered its Memorandum Opinion Containing Findings of Fact and Conclusions of Law under date of March 26, 1984, and to effectuate the relief found and determined therein to be granted as well as the rights of the parties therein determined, this Partial Final Judgment is hereby entered, and it is thereupon

ORDERED AND ADJUDGED as follows:

1. Plaintiffs shall do equity by tendering into the Registry of the Court to be held in an interest bearing Certificate of Deposit until the further Order of this Court, a sum equal to the amounts received from any

source by plaintiffs arising out of and from the April 1, 1981 Agreement (effective April 27, 1981) plus interest at 12% per annum thereon from said date to the date of payment.[1]

2. The parties' Agreement dated April 1, 1981, for the sale of plaintiffs' interests in Biscayne Centre Associates, owner of the following described property:

> Block 31 and Block 331, otherwise described as Lots 1-16, inclusive, in Block 331, of MIAMI SHORES UNIT A, according to Plat thereof recorded in Plat Book 17 at Page 44 of the public records of Dade County, Florida, a portion thereof being otherwise described as REALTY FINANCIAL AND EQUITY ONE being a Replat of Block 331 Miami Shores Unit A (P.B. 17, P. 46) lying in Section 29, Township 52 South Range 42 East, Dade County, Florida, as recorded in Plat Book 118, at page 8,

to The Johnson Collection, Inc., plaintiffs' Assignment of Joint Venture Interest dated April 1, 1981, and the Release between plaintiffs and Kaplus dated April 23,

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[1]By letter dated April 4, 1984, defendants have requested the Court to leave open for an accounting the contributions made by plaintiffs to the joint venture prior to the April 1, 1981 Agreement. However, in its Memorandum Opinion Containing Findings of Fact and Conclusions of Law, this Court had found the actual basis of the sale and purchase as agreed upon by the parties in the April 1, 1981 Agreement and, therefore, same should not now be relitigated. Also, the Court found against the defendant on the counterclaim. Therefore, to do equity, plaintiffs should be required only to give up or tender that sum which was the agreed total received or resulting from the April 1, 1981 Agreement.

1981, are hereby rescinded, and plaintiffs are declared restored to ownership of their interests in the parties' joint venture as of April 1, 1981, except that Syntek Investment Properties, Inc., has succeeded to the interest of Syntek of Florida, Inc.

3. Plaintiff Syntek Investment Properties, Inc., as successor to Snytek of Florida, Inc., is hereby restored to its position, authority and powers of Managing Partner of the parties' joint venture and entitled to custody of the assets and records of the joint venture; provided, however, that Syntek Investment Properties, Inc. shall not interfere with or prevent the exercise by Storer Broadcasting Company of its option to purchase the subject property presently scheduled for closing on or before April 27, 1984, and Syntek, as well as plaintiffs, shall cooperate with defendants in facilitating the closing of said transaction, unless otherwise directed by written Order of this Court.

4. Defendant Kaplus, his agent, servants, employees, attorneys and any and all persons in active concert or participation with them, are hereby restrained from making any management decisions for the venture and from further collecting or distributing, other than to plaintiffs, any funds belonging to the venture; provided, however, that Kaplus shall not interfere with or prevent the exercise by Storer Broadcasting Company of its option to purchase the subject property presently scheduled for closing on or before April 27, 1984, and Kaplus shall cooperate with plaintiffs in facilitating the closing of said transaction, unless otherwise directed by written Order of this Court.

5. Defendants have held all of the assets of the venture, and all proceeds thereof, as trustees for the benefit of plaintiffs to the extent of plaintiffs' original interests in the venture, and defendants are required to account fully to plaintiffs therefor, consistent with the parties' Joint Venture Agreement dated as of July 1, 1980, their agreement as to Phase II as of January 27, 1981, and this Judgment.

6. To the extent of plaintiffs' original interests therein, title is hereby quieted in plaintiffs, other than Syntek of Florida, Inc., free and clear of any and all claims of defendants and of Larry M. Cole, to ownership of the joint venture.

7. As part of defendants' accounting, plaintiffs are entitled to reconsideration by the joint venture of all transactions between the venture and defendant Kaplus, as well as any company or organization owned or controlled by defendant Kaplus, which became effective on or after April 1, 1981. Included within such accounting shall be a determination of contributions by defendant Kaplus, if any, and what, if any proportionate sums should be contributed by plaintiffs to the joint venture and/or to defendant Kaplus for sums expended by defendant Kaplus since April 23, 1981.

8. At the instance hereafter of plaintiffs, they shall be entitled to an order declaring that the joint venture be dissolved and that an accounting be conducted by the parties incidental thereto under the supervision of the Court.

9. A lien is and shall hereafter be impressed upon defendant Kaplus' interest in the joint venture,

or the proceeds thereof, for all of his obligations found due to plaintiffs in the accounting.

10. The counterclaims of defendant Kaplus for rescission of the parties' Joint Venture Agreement dated as of July 1, 1980, and for an accounting for, or repayment to him or to the venture of, any funds by plaintiffs or counterdefendant Syntek Corporation, a North Carolina corporation, as a result of the $400,000 loan made by Barclays' Bank to Phillips and Kaplus, are hereby DISMISSED on the merits with prejudice.

11. Pursuant to *Fla. Stat.* 517, *et seq.*, defendants shall pay to plaintiffs reasonable attorneys' fees in plaintiffs' action for rescission, along with plaintiffs' costs in connection with the issues tried by the Court, the amounts thereof to be hereafter determined or assessed.

12. The Court retains jurisdiction over the accounting and dissolution, including any award of principal, interest and attorneys' fees, and any incidental damages, and over any matters to be tried subsequently before the Court and/or a jury.

13. In a letter addressed to this Court under date of April 4, 1984, counsel for defendant has indicated that he intends to file a Motion to Certify pursuant to Rule 54(b), *Fed.R.Civ.P.* and thereupon, under even date herewith, having entered a Partial Final Judgment, this Court hereby reserves the right to amend same in the event that the Motion to Certify is granted so that the Partial Summary Judgment would reflect appropriately and properly certification under Rule

54(b), Federal Rules of Civil Procedure and/or Title 28 U.S.C. §1292(b), if such Motion is granted.

14. Under even date herewith this Court has entered an Order of Dismissal without Prejudice pursuant to a Motion submitted by counterclaimant dismissing Counts I and II of the Second Amended Counterclaim.

DONE AND ORDERED in Chambers at Miami, Southern District of Florida, this 16 day of APRIL, 1984.

/s/ SIDNEY M. ARONOVITZ
SIDNEY M. ARONOVITZ
UNITED STATES DISTRICT JUDGE

Copy furnished to:

All Counsel of Record

SOUTHMARK GROUP:

Southmark Corporation
Gep Properties, Inc.
Latigo Corporation
Latigo Holding Corporation
Southmark Acceptance Corp.
Southmark Comm'l Mgt Inc.
Southmark HC, Inc.
Southmark Hosp. Mgt Inc.
Southmark International Corp
Southmark Inv Group II, Inc.
Southmark Investors Inc.
Southmark Management Corp
Southmark of Texas, Inc.
*Southmark Office/Industrial
Southmark Realty Advisors, Inc
Southmark Securities Inc.
*Southmark Shopping Centers
Southmark PS, Inc.
Southmark West, Inc.
Tara Centers, Inc.
Windsor Financial Corporation

SYNTEX GROUP:

Syntek Corporation
Augusta Commercial Associates
Baytown Associates
Cross Bow Apt Associates
Forest Oaks Associates
Grammercy Place Company

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*Change/addenda since last issued

Green Oaks Associates
Kimberly Woods Associates
Main Street Associates
Oak Tree Associates
Perthshire Apt Associates
Syntex Associates
Townlake Apt Associates
Village Green Apartments Assoc
Washington Road Associates

ENVIRON GROUP:

Southmark/Envicon Capital Corp
Envicon Development Corp.
Envicon Arkansas Realty Corp.
Envicon Equities Corp.
Envicon Florida Realty Corp.
Envilew Corp.
Envisac, Inc.
Fincon Development
Largo Development P'ship
Longmore Development P'ship
Silverwood Associates
Southwest Construction P'ship
U.S. Properties/Southwest
Village Green Assoc (Shops)

NACO GROUP:

Natonal American Corporation
American Campgrounds Inc

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*Change/addenda since last issued

Steelman, L.E. & Co., Inc.
Windpoint
Resort Land Corporation
Western Fun Corp
Crossville Sales, Inc.
Indian Lakes Wild. Pres. Corp
Lake Tansi Village, Inc.
Tansi Resort, Inc.
Cherokee Landing Corporation
Rivieria Utilities of Tenn Inc
Virginia Landing Corp
Bay Landing
Direct Mail Specialist, Inc.
Exchange Network
E.N. Travel
Recreation Land Corporation
Wolf Run Manor Corporation
Rivieria Utility Water Co-Pa.
Rivieria Utility Sewer Co-Pa.
Land Planning Consultants Corp
Beech Mountian Lakes Corp
G.L. Land Development, Inc.
Natchez Trace Wild. Pres.
Chief Creek Corp
Villas of Hickory Hills
Waynoka Development Corp
Lake Royale Corporation
Rivieria Utilities of N.C. Inc
Foxwood Corporation
Shorewood Corporation
Kinston Corporation
Mountain Bay Estate Utility Co
Carolina Landing Corporation

*Change/addenda since last issued

*University Advisory Company
*University Partners Ltd

SNI GROUP:

Southmark/Sec Nat'l Inv Corp
SNI Oil & Gas, Inc.
SNI Realty, Inc.
First Associated Mgt., Inc.
*SNIC Eliminations

OTHER SUBSIDIARIES:

Lexton-Ancira Inc.
Lexton-Ancira Reif 1972-B
Lexton-Ancira Reif 1973-A
Valley Corporation
Lexton-Ancira Reif 1973-B
*North American Mortgage Inv
Arlington Realty Investors
Novus Property Company
Dominion Mortgage & Realty Tr.
Bison Hotels, Inc.
American Realty Trust
Monetary Realty Trust

NON CONSOLIDATED LIMITED PARTNERSHIPS:

1601 Partners Ltd
*1776 Yorktown Building Venture
Annex Mall Ltd.
Arlington North Ltd.
Aspen View Partnership

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*Change/addenda since last issued

Aspen-Conroy Associates
Balance Rock Associates
Bender Hollow, Ltd.
Bent Tree I Associates
Bent Tree II Associates
Bluff Creek Ranch
Brunswick West Associates
Burley Mall Associates
Burlington Center Associates
Callahan Plaza Associates
Carriage House Associates
Chalfont Center Associates
Champlain Market Place Ltd.
Charleston Square Associates
Charleston/Mobile Associates
Chelbourne Plaza
Cherry Hill Associates
Chevy Chase Associates
Cinammon Tree, Ltd.
Clarion Limited
Club Associates
Consumnes River Apartments
Coronado Associates
Corporate Square Ltd.
Country Place Associates
Craig Manor Associates
Crestview Center Associates
Crossroads Associates
Cullman Center Associates
Cypresswood Associates
Dickinson, Ltd.
Eastgate Plaza Associates
EDLP #1

*Change/addenda since last issued

EDLP #2
EDLP #3
EDLP #4
EDLP #5
Envicon Associates
Envicon Capital Partners, I
Envicon Capital Partners, II
Foothill Plaza II
Forest Green Associates
Forest Lane, Ltd.
Fox Run Realty Associates
Foxwood, Ltd.
Georgia Sunset Associates
Glenmont Associates
Greenspoint/Northland Assoc
Greentree Associates
Heritage Eden Associates
Hub Associates, Ltd.
Humble, Ltd.
Investors Resources Group
Jamestown Apartments Ltd.
King Village Associates
Kingsport Associates
La Mancha/Circle Court Assoc
Lake Road Associates
Lakeland Market Ltd.
Lakes Apartments
Lakeshore Mall Associates
Lakeside Village Associates
Landmark Assocites Ltd
Lauderdale Towers Ltd
Lawndale Apartment Associates
Lawndale Apartments Ltd.

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*Change/addenda since last issued

Lawndale Associates
Leeway Associates
Lifestyle-University Ventures
Londonderry Associates
Meadow Oaks Associates
Mediterranean Villa Associates
Meridan Associates
Mesa Park Terrace Associates
Millpond Village Associates
NC/KC Associates
North Coast Associates
North Oaks Associates
North Park Associates
North Point Associates
Northern Hills, Ltd.
Northtown Mall Associates
Oak Forest Associates
Oak Hills Associates
Oak Tree Square Associates
Oak Tree Villa Associates
Oceangate Financial Center Ltd
Orchards Associates
Ozona Partners, Ltd.
Park I & II
Park Place, Ltd.
Park West Associates
Park/Village Green Assoc
Parkway Plaza/CN Bank Building
Pebble Creek/Fruitland Assoc
Peppertree Associates
Perimeter 41 Associates
Pinellas Park Associates
Pines Associates

*Change/addenda since last issued

Porticos Associates Ltd
Preston Lakes, Ltd.
PV-W Associates
Regency Court Associates
River Oaks Associates
Riverdale Square Associates
Rolling Oaks Associates
Rosedale/Palms Associates
Royal Oaks Associates
Sage West Associates
San Antonio (Station) Assoc
San Antonio Commercial Assoc
San Pablo Associates
San-Da-Mor Associates
Sans Souci Associates
Shackelford County DDP
Sherwood Drive Associates
Shoreview Tower Associates
SNI 202 Limited
SNI 303 Limited
SNI 404 Limited
SNI 505 Limited
SNI 606 Limited
SNI 707 Limited
SNI 808 Limited
SNI 909 Limited
SNI Arlington Associates
SNI Carrolton Associates
SNI Cypresswood Associates
Soldier Creek Associates
Southern Illinois Associates
Southern Palms Associates
Southern Properties Associates

*Change/addenda since last issued

Southmark Comm'l Mgt P'Ship
Southmark/Envicon Portfolio I
*Southmark/Envicon Portfolio II
Southmark Income Investors Ltd
Southmark Partners One
Southmark Realty Partners Ltd
Southwest Associates
Spencer Street Manor
Sugarbranch Associates
Sumter Square Associates
Swiss Village Ltd.
Talisman Associates
Tower I Associates
Townhomes At Westchase
Trans-Texas Assc (Brownsville)
Trans-Texas Assc (Lewisville)
Treeline Village Associates
Trinity Village Associates
Twelve Oaks Associates
U.S. Properties
U.S. Southwest Associates
U.S. Southwest Property Co.
University Advisory Associates
University Gem Investors, Ltd.
University H.E. Gem Investors
University H.E.R.E. Fund
University H.E.R.E. Fund II
University H.E.R.E. Fund III
University R & D 81
University R.E.F. 10, Ltd.
University R.E.F. 12, Ltd.
University R.E.F. 73, Ltd.
University R.E.F., Ltd.

*Change/addenda since last issued

University R.E.I. 80, Ltd.
University R.E.I. 81, Ltd.
University R.E.I., Ltd.
University R.E.P. III
University R.E.P. IV
Univeristy R.E.P. V
University Special Partners
Villa Cordova Associates
Village Green Assoc (APT)
Village Oaks Associates
Village South Associates, II
Virginia Square, Ltd.
Washington Road
Wayne Commons, Ltd.
Webb Chapel Associates
Westview Drive Associates
Wind/Glen Associates
Winter Park Associates
Woodlake Associates
Woodside Associates

THIRD PARTIES

Drexel Burnham
Tamcrest
S & H Associates
Peachtree Associates
The Olympic Group
*Drexel Burnham 2

*Change/addenda since last issued

SIPI GROUP:

Syntek Investment Prop (SIPI)
Baytown Holding Corporation
Bradford Group, Inc.
Diamond "S" Ranch
Farmington Square
Frenchmen's Creek
Galaxy Associates
GEP Children's Trust
Hungry Bull, Inc.
May Trust
Metropolitan Associates
Nation's Ford
One Biscayne Center
Sun Valley
Snytek Drilling Corp
Syntek Oil Corp
Syntek Partners One Ltd
Syntek West, Inc
Tara Equities, Inc.

"DEAD" ENTITIES:

Barclay Circle Inc
Best Friend Road, Inc.
Boatrock Inc
Fulton Service Center Inc
Griffin 41 Inc
Holcomb Bridge Inc
Lees Mill Road Inc
New London Inc
North Peachtree Road Inc

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*Change/addenda since last issued

Quail Run, Inc
Sage West, Inc.
Southmark Development Group
British Manor Associates
Dairy Ashford Associates
Homeland Properties, II
North Willows
Southern Gardens Associates
Syntek Securities, Inc.
Envibrown Corp.
Envicon Alabama Realty Corp.
Envicon Atlantic Realty Corp.
Envicon Capital Corp.
Envicon Colorado Realty Corp.
Envicon Dev. Construction Co.
Envicon Georgia Realty Corp.
Envicon Humble Realty Corp.
Envicon J'ville Realty Corp.
Envicon Kuykendahl Realty Corp.
Envicon Minnesota Realty Corp.
Envicon New York Realty Corp.
Envicon North Carolina Realty
Envicon Oklahoma City Realty
Envicon Oklahoma Realty Corp.
Envicon Parkland Realty Corp.
Envicon Penn. Realty Corp.
Envicon Plaza Realty Corp.
Envicon Premier Realty Corp.
Envicon Property Management
Envicon Resources Corp.
Envicon Tennessee Realty Corp.
Envicon Texas Realty Corp.
Envicon Vermont Realty Corp.

*Change/addenda since last issued

Envicon Virginia Realty Corp.
Envicon Corp.
Envigat Corp.
Enviking Corp.
Envimill Corp.
Envip Corp.
Envitex Realty Corp.
Enviwest Realty Corp.
EPM Enterprises, Inc.
Woodview Realty Corp.
Lakewood Resort Developers Inc
Southmark/Univest
University Data Systems
Univest Merging Company
Univest, Inc.
University Securities Corp.
SNI Securities Inc
SN Financial Services
SN Real Estate Mgt. Inc.
SNI Properties Inc.
Lexton-Ancira Reif 1972-A
Consulate Apartments, Inc.
Prince Murat Inn Inc
Robeson Motel Corp
Capital Housing Partners III
Dallas Associates
Greenspoint II-A
University Leasing
University R.E. Trust
W & W Associates
Wendover Office Associates
*Syntek Management Inc.

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*Change/addenda since last issued

*Syntek Investments Inc.
*Syntek of Florida Inc.
*Tara Group Inc.
Park Place I, Inc.
Southmark-Spring Lake, Inc.
*University Hawaiian Advisors
*Aura Development Co., Inc.
*Marist Development Co., Inc.
*Ocean Playground, Inc.
*Upton Forest Dev. Co., Inc.
*W & M Golf & Tennis Club, Inc.
*W & M Management Co., Inc.

*Change/addenda since last issued

85-814

Supreme Court, U.S.
FILED
DEC 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-814
in the
SUPREME COURT
OF THE
UNITED STATES
October Term, 1985

ALAN C. KAPLUS,

Petitioner,

vs.

GENE E. PHILLIPS, WILLIAM S. FRIEDMAN, SYNTEK OF FLORIDA, INC.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Edward I. Cutler
Carlton, Fields, Ward,
Emmanuel, Smith & Cutler, P.A.
Attorneys For Respondents
Post Office Box 3239
One Harbour Place
Tampa, Florida 33602
(813) 223-7000

BEST AVAILABLE COPY

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(813) 223-7000

COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

DID A UNANIMOUS PANEL OF THE ELEVENTH CIRCUIT VIOLATE THE SEVENTH AMENDMENT BY HOLDING THAT A SUIT SEEKING RESCISSION OF THE SALE OF A PARTNERSHIP INTEREST, ALONG WITH A RIGHT TO AN ACCOUNTING BY A PARTNER AND THE IMPOSITION OF A CONSTRUCTIVE TRUST AND LIEN, WAS COGNIZABLE IN EQUITY?

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Orteri v. Scalzo, 145 U.S. 578, 593 (1892). 10

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COUNTER-STATEMENT OF THE CASE

In an attempt to seize this Court's attention in this factbound business dispute, Petitioner, Alan C. Kaplus,[1/] characterizes the Eleventh Circuit's opinion as one directly raising an issue of whether the complexity of a lawsuit justifies denial of a jury trial. This characterization is devoid of any basis in the opinion below or elsewhere in the record. Petitioner also criticizes the Eleventh Circuit for not following dicta in a Third Circuit opinion, but then admits that the Eleventh Circuit's decision on the only issue presented here followed the Supreme Court's Seventh

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1/ Although the Petition's printed cover says "PETITION FOR WRIT OF CERTIORARI," the contents contain no petitioning language or even a reference to certiorari. The "PETITION" does not purport to include the Johnson Collection, Inc., Petitioner's co-defendant in the District Court and co-appellant before the Eleventh Circuit.

Amendment teachings in Ross v. Bernhard, 396 U.S. 531 (1970). Petition at 8-9. Petitioner's real complaint with the decision below can be seen when he states:

> "Reading the thirty page opinion of the trial court, no one can say that the result was unjust. But, it is based upon sharply contested findings of fact."

Petition at 3.

The petition falls far short of presenting a "special and important reason" for granting certiorari, as required by Supreme Court Rule 17. The Court should deny Petitioner's attempt to create a cert-worthy issue of Petitioner's fact-specific disappointment.

At the time this case was set for trial, Respondents, plaintiffs below,

sought only a rescission of their sale to Petitioner of Respondents' interests in a real estate partnership, plus a post-rescission accounting and the establishment of a constructive trust, and imposition of a lien upon Petitioner's and his co-defendant's interests in the partnership. Petition Appendix at 8-9. Although Respondent had initially sought money damages, that claim was dropped well before trial. Petition Appendix at 8-9.2/

Petitioner, albeit imperfectly, requested a jury trial, but the District Court ruled that the claims remaining in this suit were equitable in nature, to be tried before the court without a jury. At the ensuing bench trial the District Court found that Petitioner and his co-

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2/ Respondent at first asserted counterclaims for money damages but dismissed them all, and did not appeal any issues arising out of these claims.

defendant had defrauded Respondents into selling Respondents' interests in the partnership to Petitioner and his co-defendant. Pertinent excerpts of the District Court's findings of fact are attached as Respondent's Appendix. ("Resp. App.") As part of its holding the District Court found against Petitioner on all issues relating to credibility and veracity. Resp. App. at A10. The District Court granted a rescission of Respondents' sale to Petitioner and his co-defendant, recognized a constructive trust, impressed a lien upon Petitioner's interest in the partnership, and held that Respondents were entitled to a future accounting in order to trace funds and to restore the partnership's accounts to the status before the fraud. Petition Appendix at 8. The District Court has

not yet undertaken an accounting and has not as yet held that Respondents are entitled to any specific funds.

In order to protect Respondents and to protect the integrity of the court's order from possible diversion of funds, the District Court ordered all funds generated from the partnership's property to be placed into the court's registry. This money has remained in the registry because the District Court has retained jurisdiction over the accounting, which has not yet taken place. Contrary to Petitioner's contention [Petition at 3], at no time has any court held that any of the parties is entitled to money. Whether the respective parties will be entitled to share in the partnership funds, and the amounts to be shared, must await the accounting.

The unanimous panel of the Eleventh Circuit, per Judge John R. Brown, specially sitting, affirmed the District Court's denial of a jury trial.[3/] The Circuit Court noted that before trial Respondents had dropped their claims for damages and "[t]he essence of [Respondents'] complaint below was a request to rescind the transfer of their partnership interest to [Petitioner], and to restore the parties to their positions as joint venturers as they existed before the fraudulent transfer took place." Petition Appendix at 12. The Eleventh Circuit held that rescission of the sale of the partnership interest was properly tried without a jury. The court then

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3/ The Circuit Court reversed the District Court's holding that the transactions in question involved a security. Although this decision had the effect of denying attorney's fees to Respondents under the Florida Securities Law, Respondent have elected not to file a cross-petition on this issue.

relied upon historical precedent and the Supreme Court's three-part test in Ross v. Bernhard to hold that the right to an accounting is equitable in nature, to be tried before the Chancellor.

REASONS FOR DENYING THE WRIT

I. The Eleventh Circuit Did Not Deviate From This Court's Seventh Amendment Teachings in Ross v. Bernhard and Dairy Queen v. Wood

The Seventh Amendment preserves to litigants the right to jury trial in suits at common law, "suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. . . ." Parsons v. Bedford, Breedlove & Robeson, 3 Pet. (U.S.) 433, 447 (1830). After the merger of law and equity in the federal system in 1938, the determination of the precise legal or equitable nature of a cause of action was rendered more difficult.

The Supreme Court's most recent teaching on this issue is found in the

three-part test of Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970):

> [T]he "legal" nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries."

The Eleventh Circuit considered these three criteria correctly.

The Eleventh Circuit properly addressed the first criterion of Ross, stating that, before the merger of law and equity, suits seeking rescission of sales of partnership agreements, with rights to an accounting and imposition of a constructive trust, were creatures of the Chancellor. Pre-merger custom dictated that Equity would determine the relationships and duties of partners to each other, and the winding up of partnership affairs after a fraud. E.g.,

Mathewson v. Clarke, 6 How. (U.S.) 122 (1847); Ambler v. Whipple, 20 Wall. (U.S.) 546 (1874); Simonton v. Sibley, 122 U.S. 220 (1887)(bill in chancery for settlement of accounts of partnership). As Chief Justice Fuller stated in Oteri v. Scalzo, 145 U.S. 578, 593 (1892):

> "Undoubtedly equity has jurisdiction where . . . there may be such fraud, misconduct, and breach of duty in the conduct [of the partnership's] affairs from the inception, as to justify, upon dissolution, as between the parties, the restoration of his capital to the injured partner."

Further, it is clear that the Eleventh Circuit properly assessed the second criterion under Ross, giving due consideration to the remedy sought. Unlike the petitioners in Dairy Queen v. Wood, 369 U.S. 469 (1962), who sought money judgments on a contractual debt but

denominated such claims as equitable, Respondents at time of trial sought only true equitable remedies.

There can be no doubt that the remedies sought by Respondents at trial (rescission, accounting, and a constructive trust and lien) are historically equitable. In both federal and Florida courts, such suits remain equitable in nature.[4/] E.g., Friedman v. Golden Arrow Films, Inc., 442 F.2d 1099 (2d Cir. 1971); Luff v. Luff, 158 F.Supp. 311 (D.D.C. 1958), aff'd in part and rev'd in part, 267 F.2d 643 (D.C. Cir. 1959); Schaefer v. Gunzberg, 246 F.2d 11 (9th Cir.), cert. denied, 355 U.S. 831

4/ As the Eleventh Circuit's opinion noted, the right to a jury trial in federal court is a federal question. Simler v. Conner, 372 U.S. 221 (1963). Florida law is, of course, relevant because the District Court's jurisdiction over the equity issues, by virtue of the Eleventh Circuit's decision, was based on diversity of citizenship.

(1957); Padgett v. First Federal Savings & Loan Assn., 378 So.2d 58 (Fla. 1st DCA 1979); Riggs v. Saltmarsh, Cleaveland & Grund, 341 So.2d 818 (Fla. 1st DCA 1977).

The inadequacy of Respondents' remedies at law was clearly established in the preliminary proceedings before the District Court. The Eleventh Circuit correctly affirmed these findings when it held that the remedies sought by respondent were equitable.

Finally, the Eleventh Circuit gave proper consideration to the third Ross factor, which addresses "the practical abilities and limitations of juries." Ross, 396 U.S. at 538 n.11. The Circuit Court noted that the complexity of actions for an accounting supports Equity's jurisdiction over such suits, and the claims and remedies involved in this case were complex, thus supporting

equitable jurisdiction. Id. at 538. The court surveyed cases from the Supreme Court and other Circuits and declined to follow the suggestion found in language from a Third Circuit opinion that mere complexity of facts alone might provide the basis for the denial of a jury trial in federal court.

The Eleventh Circuit's decision in this regard follows the letter and spirit of Ross. Under Ross' tripartite test for determining the legal or equitable nature of an issue, 396 U.S. at 538 n.10, other factors besides complexity bear on the decision to grant or deny a jury trial.

That the Eleventh Circuit considered all of the Ross criteria also reflected the true nature of this case. This case involved simple remedial steps taken to restore and wind up a partnership victimized by fraud. Although somewhat

complex, this case did not entail the myriad documents, proof, and witnesses, or conceptually difficult scientific or legal issues which might convince a court to deny a jury trial because of complexity alone. Thus the Eleventh Circuit's consideration of all three Ross factors was required by the facts of this case as well as by Ross itself.

Petitioner asks this Court to review the question of whether the complexity of the case alone is sufficient to deny a jury trial. The District Court did not on such grounds deny, nor did the Eleventh Circuit on such grounds affirm denial, of a jury trial. Petitioner seeks this Court's review of an issue upon which neither court below based its holding. The issue of complexity was in no way involved in the case other than in a passing reference to Ross.

II. There Is No Conflict With The Third Circuit

Petitioner attempts to show that the Eleventh Circuit's Seventh Amendment holding conflicts with language found In Re Japanese Electronic Products Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980). Even a cursory reading of the Third Circuit's opinion belies Petitioner's contention. These two cases are not remotely similar.

Japanese Electronic Products was a gargantuan antitrust and antidumping suit against over 100 world-wide co-conspirators which "after nine years ha[d] produced millions of documents and over 100,000 pages of depositions." Id., 631 F.2d at 1072-1074. Respondents' suit, however, involved one partnership which owned two plots of land; one of these plots (upon which reconstruction

had commenced) had low-rise buildings on it, and the other was a trailer park. Plaintiffs in Japanese Electronic Products sought treble damages for statutory antitrust and antidumping violations, which are compensatory and punitive remedies, plainly legal in nature. 631 F.2d at 1079. In contrast, Respondents merely requested Equity to restore them to their status as partners before Petitioner's fraud.

The facts of Japanese Electronic Products show that the defendants there appealed an interlocutory order of the District Court which had granted the plaintiffs a jury trial. On appeal, the defendants claimed that the case was too complex for a jury and argued that the District Court had ignored the third element of the Ross test. The Third Circuit vacated the District Court's

ruling, primarily on Fifth Amendment Due Process grounds. The Third Circuit held that "in suits at law, a court should deny [a] jury trial on due process grounds only in exceptional cases, [if the court] determines that a jury would be unable to understand the case. . . ." Id. The Third Circuit did not deal with suits in equity.

The Third Circuit, moreover, expressly rejected the defendants' attempt to analogize the antitrust/antidumping action at law to a suit for rescission or accounting before a Chancellor. 631 F.2d at 1080-1081. The Third Circuit itself thereby has refuted Petitioner's claim that these two suits are somehow similar. Id.

Additionally, the very holdings of the Eleventh and Third Circuits do not permit comparison between the two cases. The

Eleventh Circuit made the unremarkable holding that the Seventh Amendment did not entitle Petitioner to a jury trial in a proper suit in equity. In contrast, the Third Circuit held that in some extremely complex cases at law the Due Process Clause might override the right to a jury trial. The Third Circuit made no final determination on this Due Process issue, however, but remanded the case for the District Court to determine the jury trial issue within the Third Circuit's new Due Process framework.

Petitioner is certainly correct in his contention [Petition at 9] that the reasoning and scope of the two cases differ. The differences in "reasoning", "language" or "scope" are no grounds for the grant of certiorari in the United States Supreme Court. The only case Petitioner cites that has legal issues

similar to the case at bar is Ross v. Bernhard. Petitioner admits, however, that the Eleventh Circuit followed Ross. Petition at 8-9.

III. PETITIONER HAS NOT PRESERVED ANY FIFTH AMENDMENT JURY TRIAL ISSUES

Petitioner criticizes the Eleventh Circuit obliquely for not applying a "Fifth Amendment test" to a right to jury trial. [Petition at 9], and in a string of rhetorical questions suggests that this Court should review such an issue. Petition at 10. This issue appears for the first time in this lawsuit in the Petition for Certiorari. It was never raised below in any form, nor was it considered by either Court below. It must be deemed waived. In any event, it has no merit.

CONCLUSION

Chief Justice Hughes stated, "I think it safe to say that about 60 percent of the applications for certiorari are wholly without merit and ought never to have been made." Letter to Sen. Wheeler, 81 Cong. Rec 2814-2815 (1937). This Petition falls squarely within Chief Justice Hughes' description.

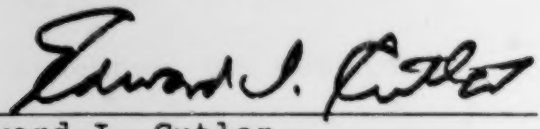
The Petition starts by presenting a question for review which was not the basis of the holding below or even directly involved in it. The Petition ends by postulating Due Process issues which Petitioner has raised for the first time, ever, on certiorari. The middle of the Petition is equally without merit. It suggests a conflict with language in a Third Circuit opinion, even though that

case is utterly dissimilar on the facts and only tangentially similar on the law.

Petitioner is understandably disappointed that his fraud upon his partners was rendered naught by the Chancellor. His disappointment, however, does create proper grounds for certiorari in a case were there are none.

WHEREFORE, this Petition should be denied.

Respectfully submitted,



Edward I. Cutler
Carlton, Fields, Ward,
Emmanuel, Smith & Cutler, P.A.
Attorneys For Respondents
One Harbour Place
Post Office Box 3239
Tampa, Florida 33602
(813) 223-7000

APPENDIX - SELECTED UNCONTROVERTED RELEVANT FINDINGS OF FACT

7. For a year or more prior to July 1, 1980, Kaplus endeavored to interest a prospective joint venturer or venturers to put together with him a project for the acquisition and development of two blocks of land located at Biscayne Boulevard and 120th Street in Miami, Florida. One block, intended for Phase I, was then improved only be some low-rise, aging structures. The other block, for Phase II, was improved by an operating trailer park. Kaplus did shortly before July 1, 1980, reach an oral agreement with Phillips, who was acting on behalf of himself and other other plaintiffs, to proceed with the project as joint venturers under the name Biscayne Centre Associates. [N.T. 37 et seq., 270 et seq., 601 et seq.] (R. 1179)

8. Kaplus, as a joint venturer with plaintiffs, thereupon occupied a fiduciary relationship to plaintiffs [Stip. 8]. (R. 1179)

11. Defendant The Johnson Collection, Inc., was incorporated by Larry M. Cole, a New Jersey lawyer and friend of Kaplus, on January 9, 1981 [Stip. 5(e)]. It became Cole's shell or shelf corporation [P-110, pp. 44-45]. At the time it had no relation to Biscayne Centre [P-110, pp. 44-45]. (R. 1180)

30. On or about February 9, 1981, Kaplus told Phillips he had the possibility of negotiating a 60,000 square foot lease with Storer Broadcasting Company [Stip. 5(b)], writing a letter to Storer Broadcasting Company, with a copy to Phillips [P-26]. (R. 1183)

31. Negotiations with Storer Broadcasting Company continued actively [P-70; P-11; N.T. 590]. (R. 1183)

32. On March 17, 1981, Kaplus... met with top officers of Storer Broadcasting Company and reached what was believed to be an agreement in principle for an ultimate purchase by Storer of the Phase I building, with a leaseback of lower floors of the building. Kaplus promised to prepare a letter or letters of intent....

37. Kaplus presented to Terry Lee of Storer at a meeting on March 30, 1981, a detailed proposal for a lease with option to purchase, a management agreement for an entity owned by Kaplus, and a permanent loan commitment to be furnished by Storer, including a statement that Storer has expressed an interest in funding a construction loan [P-12].

38. The foregoing developments between March 17, 1981 and March 30, 1981 were not disclosed to plaintiffs [N.T. 150-151, 312-313, P-107, pp. 31-32; P-108, pp. 141-142]. Kaplus never told plaintiffs about Storer's interest in providing financing [P-108, pp. 141-142]. (R. 1185)

41. Kaplus during the end of March 1981 and early April discussed with Marvin Rosen of Sunset Commercial Bank the matter of funds to buy out plaintiffs [P-108, pp. 122, 125, 135, 137, 139-140, 148-150]. (R. 1185)

43. Instead of informing plaintiffs of his current prospects with Storer and for financing, Kaplus during latter March and early April of 1981, told Phillips that the prospects of signing up sufficient tenants to meet lender rent-up requirements within the time specified in

the pending loan commitments were dim, that he was pessimistic about Storer [N.T. 397], that the lender would be unwilling or unable to give an extension [N.T. 307-308]. At the same time Kaplus advised Phillips that he had located prospective investors, including prospects through a contact in New Jersey, who might be willing to buy the entire project [N.T. 315-316]. (R. 1186)

45. Kaplus later told Phillips that his prospective purchasers wanted him, Kaplus, to remain in and to manage the venture, but they might be willing to purchase plaintiffs' interest in the venture at a relatively small profit to plaintiffs, leaving Kaplus with his small minority interest in the venture.

47. Without disclosing to plaintiffs that he was doing so, Kaplus negotiated with the Sunset Commercial Bank to borrow

enough cash in the name of Biscayne Centre Associates to make the cash down payment on a purchase of plaintiffs' interest in the venture, representing to the bank that he would be the purchaser.

50. A closing session for the sale transaction of plaintiffs' interest in the venture, presumably to Kaplus' prospects, took place in the New York.... Larry Cole and Kaplus were present, along with Phillips, Friedman and Stephen Levy, a lawyer in Friedman's office [Stip. 5(k)]. Phillips agreed that Kaplus would share in the proceeds of sale, and they agreed upon an allocation of the proceeds of sale [N.T. 328]. At the closing session, Kaplus objected to the plaintiffs' taking back a mortgage on the property to secure the deferred portion of the purchase price. He said that, since he was leaving his "profit" in the

deal, if the plaintiffs foreclosed the mortgage, the plaintiffs should give him back his partnership interest. Based on what he had told the plaintiffs about the purchaser's motivation, he obtained from plaintiffs a letter agreement dated April 23, 1981 [P-101], that the plaintiffs would take him back as a partner if the plaintiffs became the sole owner of the property as a result of foreclosing the purchase money mortgage received from The Johnson Collection, Inc. [Stip. 5(1); N.T. 334]. Plaintiffs were never informed that Kaplus was to be a stockholder in The Johnson Collection, Inc... On the contrary, Kaplus at and prior to the closing told Phillips he did not knew [sic] the identity of the purchasers...

51. On April 23, 1981, in New York the parties executed an AGREEMENT for the

sale by plaintiffs purportedly to The Johnson Collection, Inc., of plaintiffs' interest i n the Joint Venture, dated as of April 1, 1981 [P-2]. The agreement was held in escrow and not to be delivered until April 27, 1981 [Stip. 5(i)]. (R. 1188)

58. Plaintiffs did not then know or have reason to know of the foregoing undisclosed facts, but, if plaintiffs had then known of any of those facts, they would not have executed and delivered the AGREEMENT and would not have closed the consummated the sale of their interest in the Joint Venture to The Johnson Collection, Inc.

59. Under date of July 2, 1981, Kaplus, signing individually and as president of The Johnson Collection, Inc., executed a fictitious name affidavit [P-14] and a Partnership

Agreement for Biscayne Centre Associates, listing his share as 95% and The Johnson Collection, Inc.'s as 5% [part of P-78]. (R. 1191)

60. On and before July 10, 1981, Kaplus, through his tax counsel, took the position [P-13] with Larry M. Cole, who had formed The Johnson Collection, Inc., that Cole for a fee had acted as a nominee through the corporation for Kaplus to acquire plaintiffs' 75% interest in the Joint Venture and stated, as did Cole, that:

> ". . . this nominee relationship was necessary in order to avoid disclosing Mr. Kaplus' identity to the selling Joint Venturer, as such disclosure would have prevented Mr. Kaplus' acquisition of the entire project."

62. At and prior to July 24, 1981, when plaintiffs accepted the balance due under the purchase money note and

mortgage dated April 1, 1982, they did not know or have reason to know the true facts with regard to Storer Broadcasting Company's interest and the likelihood in April of 1981 of a favorable transaction with Storer or of the extent of Kaplus' ownership of stock in The Johnson Collection, Inc. (R. 1192)

87. Credibility issues exist by reason of conflicts in the testimony of plaintiffs Gene E. Phillips and William S. Friedman on the one hand, and defendant Alan C. Kaplus on the other. After carefully considering the demeanor and conduct of the witnesses, the credibility of their testimony. . . this Court finds and gives greater weight and credibility to the testimony of plaintiffs Gene E. Phillips and William S. Friedman than to the testimony of defendant Alan C. Kaplus. . . Credibility

issues were likewise raised and apparent with regard to the testimony of other witnesses for the defendants and in this regard, the Court resolves such issues favorably to the plaintiffs by reason of the individual and several Findings of Fact herein.

Supreme Court, U.S.
FILED
DEC 10 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-814

in the Supreme Court of the United States

OCTOBER TERM, 1985

ALAN C. KAPLUS,

Petitioner,

vs.

GENE E. PHILLIPS, WILLIAM S. FRIEDMAN
SYNTEK OF FLORIDA, INC.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

REPLY BRIEF ON WRIT OF CERTIORARI

RICHARD L. LAPIDUS, ESQUIRE
2222 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
(305) 358-5690

Attorney for Petitioner

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Respondent has missed the point.

Ross v. Bernard, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970) in a footnote reiterates a three part test for determining whether the right to trial by jury exists.

First, historically, did the case sound at law or in equity? Accounting suits were tried in both courts.

Second, was a legal or equitable remedy sought? Accounting was both a legal and an equitable remedy.

Third, could a jury understand the case? In *Dairy Queen v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962), this Court opined that because Rule 53(e)(3) Fed.R.Civ.P. allows a court to appoint special masters to assist a jury and unravel the accounts, seldom if ever, could this third ground be used to deprive a litigant of the Seventh Amendment right to trial by jury.

Had the Eleventh Circuit simply ignored *Dairy Queen* and followed *Ross*, this case might not warrant future review.

But it did more. The Third Court in *In re Japanese Electronic Products Anti-trust Lit.*, 631 F.2d 1069 (3rd Cir. 1980) has either rejected *Ross* or defined the third *Ross* test to require that in order to warrant dispensing with the Seventh Amendment, the matter must be so unintelligible to a jury that to try it to one would deprive a litigant of his Fifth Amendment right to due process of law. The Eleventh Circuit here, has not only

refused to follow the Third Circuit, but has interpreted this Court's *Ross* language:

> ". . . the practical abilities and limitations of juries . . ."

to mean that an observation that the matter is "certainly complex" is sufficient to warrant a bench trial.

This case and its progeny, if allowed to live and breed, will spawn confusion, uncertainty and havoc in an area of the law long guarded by this Court as the bastion of our liberties, the right to trial by jury.

Respectfully submitted,

RICHARD L. LAPIDUS
Attorney for Petitioner